STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

MARIE DEAN, Personal Representative of the Estates of TALEIGHA MARIE DEAN, deceased, AARON JOHN DEAN, deceased, CRAIG LOGAN DEAN, deceased, and EUGENE SYLVESTER, deceased,

Plaintiff/Appellee,

v

JEFFREY CHILDS,

Defendant/Appellant,

and

THE CHARTER TOWNSHIP OF ROYAL OAK, DAVID FORD, FRANK MILES, JR., FRANCES THURMAN, JERRY SADDLER and CYNTHIA PHILLIPS,

Defendants.

MSC Case No.:

Previous MSC Case No.: 122171

COA Case No.: 244627 (On Rem)

Previous COA Case No.: 240573

OCCC Case No.: 01-029844-NO

***AMICI CURIAE* BRIEF OF**
THE MICHIGAN MUNICIPAL LEAGUE and
THE MICHIGAN TOWNSHIPS ASSOCIATION

PROOF OF SERVICE

O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.
By: JULIE McCANN O'CONNOR (P38484)
JAMES I. DeGRAZIA (P22853)
Attorneys filing Amici Curiae Brief on behalf of
The Michigan Municipal League and
The Michigan Townships Association
4111 Andover Road - Suite 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

CASES **PAGE**

INDEX OF AUTHORITIES – CONTINUED **PAGE**

INDEX OF AUTHORITIES – CONTINUED **PAGE**

MISCELLANEOUS AUTHORITY

JURISDICTIONAL STATEMENT

Amici Curiae, Michigan Municipal League and Michigan Townships Association, rely upon the jurisdictional statement of the Defendant/Appellant.

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE OF MCL 691.1407(2), AND THIS COURT'S HOLDING IN *ROBINSON v DETROIT,* IN HOLDING THAT THE EFFORTS OF DEFENDANT FIRE FIGHTER TO EXTINGUISH A FIRE COULD BE "THE PROXIMATE CAUSE" OF INJURY TO PLAINTIFF'S DECEDENTS.**

Amici Curiae MML and MTA say: **"YES"**

II. **WHETHER THE SAME POLICY CONSIDERATIONS WHICH CONVINCED THE COURT IN *BEAUDRIE v HENDERSON* TO RETAIN THE PUBLIC DUTY DOCTRINE IN CASES INVOLVING POLICE OFFICERS JUSTIFY EXPANDING THE PROTECTION OF THE DOCTRINE TO ENCOMPASS OTHER PUBLIC SAFETY EMPLOYEES, SPECIFICALLY, FIRE FIGHTERS.**

Amici Curiae MML and MTA say: **"YES"**

STATEMENT OF FACTS

Amici Curiae, Michigan Municipal League ("MML") and Michigan Townships Association ("MTA"), rely upon the Statement of Facts in the Application of Defendant/Appellant, Jeffrey Childs.

INTRODUCTION

A. Defendant's Application

Plaintiff has alleged gross negligence on the part of Defendant/Appellant, Jeffrey Childs, a Royal Oak Township fire fighter who was involved in the effort to extinguish the fire at Plaintiff's home. Tragically, Plaintiff's four (4) children perished in the fire. Plaintiff's complaints have attempted to impose liability on the municipal defendants. Specifically, Count II sought to impose liability on the individual Defendants based on their alleged gross negligence which Plaintiff asserts was the proximate cause of her childrens' deaths.[1] Defendant/Appellant, Childs, is the only remaining individual Defendant; the others were dismissed on the basis of absolute immunity under MCL 691.1407(5). Defendant Childs moved for summary disposition of Plaintiff's state claims on the basis of both governmental immunity and the public duty doctrine. The Township, likewise, sought dismissal of the 42 USC §1983 claim against it. Following a motion for summary disposition, motion for reconsideration, second motion for summary disposition, and motion for clarification, Defendant Childs and the Township sought and were granted leave to appeal to the Court

---

[1] At the same time, however, Plaintiff acknowledged that on April 6, 2000, a fire occurred at the residence of Plaintiff and the decedents. (**Plaintiff's Complaint, ¶8**). The Complaint also acknowledged that the decedents died as a result of the fire. (**Complaint, ¶9**).

of Appeals[2] regarding (1) the §1983 claim against the Township, (2) the issue of whether Childs' conduct could be "the proximate cause" of Plaintiff's decedents' deaths, and (3) whether Childs owed a duty to Plaintiff's decedents.

On May 13, 2004, the Court of Appeals issued its opinion holding that Plaintiff's allegations were sufficient to support a claim of gross negligence and that such gross negligence could be "the proximate cause" of Plaintiff's decedents' injuries. Although it acknowledged this Court's definition of "the proximate cause" in ***Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000)** as being the "one most immediate, efficient, and direct cause preceding an injury," and not merely "a proximate cause," it went on to state that "Plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner." (**See Ex A, *Dean v Childs,* 262 Mich App 48, 58; 684 NW2d 894 (2004)**). Based on this Court's opinion in ***Beaudrie v Henderson,* 465 Mich 124; 631 NW2d 308 (2001)**, the panel further concluded that the public duty doctrine did not apply to fire fighters, but only to police officers, and therefore Defendant was not entitled to summary disposition on that basis. The federal claims against the Township were, however, dismissed.

The dissenting judge, concurring in part and dissenting in part, concluded that "the factual support for Plaintiff's allegations are insufficient for a reasonable juror to conclude that the alleged gross negligence of Defendant Childs was '*the* proximate cause' of the deaths of Plaintiff's decedents." (Emphasis in original) (**262 Mich App at 60, Griffin, J, concurring in part and dissenting in part**).

---

[2] Pursuant to the Michigan Supreme court's Order, October 30, 2002, ***Dean v Ford,* 467 Mich 898; 654 NW2d 327 (2002)**.

Judge Griffin continued, "the most immediate, efficient and direct cause . . . of the tragic deaths of Plaintiff's children was the fire itself, not Defendant's allegedly gross negligence in fighting it." (***Id*, p. 61**).

The panel unanimously agreed that Childs was not entitled to dismissal pursuant to the public duty doctrine which provided protection only to police officers pursuant to ***Beaudrie, supra***.

Following the issuance of the Court of Appeals' opinion, Defendant Childs filed an application for leave, seeking to appeal the denial of his motion for summary disposition of Plaintiff's state law claims.

This application thus presents two (2) significant questions. First, whether the Court of Appeals' decision, while paying lip service to the clear language of the statute and to this Court's opinion in ***Robinson, supra,*** actually returned to the analysis of proximate causation espoused in ***Dedes v Asch,* 446 Mich 99; 521 NW2d 488 (1994)**, and required only that defendant's actions be "*a*" proximate cause or substantial factor in the decedent's injuries. Since ***Dean v Childs*** is a published opinion, it is of particular concern because the existence of a published opinion has the potential to influence other cases involving individual immunity under MCL 691.1407(2).

The second question presented is whether this Court should revisit its decision in ***Beaudrie, supra,*** limiting the protections of the public duty doctrine to police officers only, and consider whether the same factors which supported the decision to retain the public duty doctrine for police officers also justifies its extension to other public safety personnel. Clearly, governmental immunity, although broad, did not provide sufficient protection to

Defendant Childs while performing fire fighting functions. It is in this context that ***Dean v Childs*** comes before this Court.

B. Interest of Michigan Municipal League and Michigan Townships Association

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 511 Michigan cities and villages of which 430 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through the Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors whose members includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage, Ruth Carter, corporation counsel, Detroit; Andrew J. Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; Bonnie Hoff, city attorney, Marquette; Peter Doren, city attorney, Traverse City and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the

administration of township government services under the laws and statutes of the State of Michigan. This Brief Amici Curiae is authorized by the Board of Directors of the Michigan Townships Association.

STANDARD OF REVIEW

De novo review is accorded to questions of statutory interpretation. ***Roberts v McCosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002)**. Denial of Defendant's Motion for Summary Disposition based on the lack of any common law duty is also reviewed *de novo*. ***Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999)**. A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. ***Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998)**.

ARGUMENT I

THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE OF MCL 691.1407(2), AND THIS COURT'S HOLDING IN *ROBINSON v DETROIT,* IN HOLDING THAT THE EFFORTS OF DEFENDANT FIRE FIGHTER TO EXTINGUISH A FIRE COULD BE "THE PROXIMATE CAUSE" OF INJURY TO PLAINTIFF'S DECEDENTS

One of the issues raised by this appeal involves the interpretation of the employee immunity provision of the governmental tort liability statute. The statute, MCL 691.1407(2) provides that an employee is entitled to immunity if he or she satisfies the three (3) requirements of the statute. It states in pertinent part:

> Each . . . employee of a governmental agency . . . shall be immune from tort liability for injuries to persons or damage to property caused by the . . . employee . . . while in the course of employment . . . while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

If an employee meets these requirements, he is entitled to the protection of the immunity statute. Both subsection (a) and (b), are met in this case. It is subsection (c) that is at issue and requires Plaintiff to prove not only that the employee was grossly negligent, but also that his negligence was "the" proximate cause of the injury before immunity may be denied.

Prior to this Court's seminal decision in ***Ross v Consumers Power Co* (on reh), 420 Mich 567; 363 NW2d 641 (1984),** this Court had given broad meaning to the exceptions to governmental immunity. ***Ross*** signaled a change in this Court's interpretation of the immunity provisions of the Governmental Tort Liability Act. It is now accepted that the Legislature intended to provide broad protection from tort claims, with only limited, narrow exceptions to immunity. ***Robinson, supra,* 462 Mich 455**.

Robinson v City of Detroit

In ***Robinson, supra,*** this Court considered the extent of civil liability for governmental agencies and police officers when a police pursuit results in injury to a person other than the driver of the fleeing vehicle. **462 Mich at 444.** In doing so, the Court was called on to construe not only the provisions of the motor vehicle exception to immunity, MCL 691.1405, but also those of MCL 691.1407(2), the employee provision of the governmental immunity act.

Robinson began by noting that the Court's "seminal decision" in ***Ross, supra,*** had held that statutory exceptions to governmental immunity were to be narrowly construed. **462 Mich at 455.** Prior to that, the Court had given the exceptions broad readings. ***Id.*** The ***Robinson*** Court found that the first two elements of the employee provision of the Act were met (as they are in most cases involving governmental employees). That is, the police officers were acting within the scope of their authority and the govenmental agency was engaged in the exercise or discharge of a governmental function. MCL 691.1407(2)(a) and (b). The ***Robinson*** Court's analysis focused on the third element of the statute:

> (c) the . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Acknowledging that Michigan strictly construes statutes imposing liability on the State in derogation of the common law rule of sovereign immunity ***Id.* at 459**, the Court carefully reviewed the rules of statutory construction and concluded that "[t]he Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause. The phrase

'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." **462 Mich at 459**.

In reaching this conclusion, ***Robinson*** overruled ***Dedes, supra,*** to the extent that it effectively interpreted "the proximate cause" in subsection (c) to mean "a proximate cause." The Legislature was aware of the distinction between "the proximate cause" and "a proximate cause" because it had made the distinction in various statutes. **462 Mich at 460**. Accordingly, the ***Dedes*** majority's decision to read "the proximate cause" as "a proximate cause" was particularly indefensible. The ***Robinson*** Court was thus committed to correcting the "flawed analysis of the *Dedes* majority." ***Id***. It concluded that the Legislature intended to provide tort immunity for government employees unless their conduct "amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." ***Id*, at 462**.

In ***Robinson***, the police officer's pursuit of the fleeing vehicle was not, as a matter of law, "the proximate cause" of plaintiff's injuries. The one most immediate, efficient, and direct cause of plaintiff's injuries was the reckless conduct of the drivers of the fleeing vehicles. In the present case, the one most immediate, efficient, and direct cause of the decedents' injuries was not the attempt of Defendant Childs to fight the fire, but rather, the fire itself, or if it was proven to be set by an arsonist, the conduct of that person. Instead of reaching that common sense conclusion, however, the majority of the Court of Appeals' panel held, without analysis, that "[w]hile it is likely that the arsonist was 'a proximate cause' of the childrens' deaths, Plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner."

Therefore, the majority held that the trial court had properly denied Childs' motion for summary disposition on the ground of statutory immunity. **262 Mich App at 58**. This is an insupportable conclusion, given the language of the statute, and this Court's analysis of the meaning of "the proximate cause."

This is a significant departure from established precedent, in light of the clear guidance provided by ***Robinson***. In essence, the majority returned to the discredited proximate cause analysis of ***Dedes***, which had rejected a "literal interpretation" of the statute and stated that "the interpretive force of the literal language is less significant than the force of other factors" and could not be used to limit recovery if there was more than one cause. ***Dedes, supra,* at 118.**[3] The Court of Appeals' majority acknowledged that the arson was "a proximate cause," yet it still concluded that Mr. Childs' methods of fighting the fire could nonetheless be the "one most immediate, efficient, and direct cause of the injury" to Plaintiff's decedents. This holding is totally contrary to the statute's clear and unambiguous language and this Court's analysis in ***Robinson***. One must question whether the majority's interpretation of the statute reflected its own policy considerations rather than those of the Legislature.

In contrast, the dissenting opinion analyzes Plaintiff's claim of causation with

---

[3] "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was cause of all our woe.' But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" ***Manning v Bishop of Marquette,* 345 Mich 130, 135-136; 76 NW2d 75 (1956), quoting Prosser on Torts (1st Ed) p. 312.**

reference to ***Robinson***, while reviewing the facts in the light most favorable to plaintiff. The dissent concluded that the fire itself was the most immediate, efficient, and direct cause of the decedents' deaths. "Plaintiff's original, amended and second amended complaints, in effect, concede that the fire was the proximate cause of the deaths. . . ." (**262 Mich App at 62**). The dissent acknowledged that Defendant's gross negligence in fighting the fire may have been "a substantial factor" but found its causal connection insufficient "to meet the threshold standard of 'the proximate cause.'" (***Id***).

Had the majority applied the interpretation of "the proximate cause" set forth in ***Robinson***, the outcome would have been different. It is incumbent upon this Court to correct this misinterpretation in a published opinion of the Court of Appeals before it is compounded.

Other Court of Appeals' Opinions

Most post-***Robinson*** opinions of the Court of Appeals have had no difficulty analyzing proximate causation in the context of individual immunity, and rejecting attempts to use "but for" or "substantial factor" causation to satisfy the standard set forth in MCL 691.1407(2)(c). They have properly concluded that these requirements are insufficient to satisfy the clear language of the statute.

In ***Curtis v City of Flint,* 253 Mich 555; 655 NW2d 791 (2003)**, a plaintiff brought suit against the city and a paramedic, alleging governmental and employee liability for negligent operation of an emergency medical vehicle. The suit arose from an accident in which the plaintiff rear-ended a vehicle which had pulled over into the curb lane and stopped in order to allow the paramedic unit onto the road against a red traffic signal.

Plaintiff suffered severe injuries as a result of a collision with the stopped vehicle. The Court of Appeals affirmed dismissal of the claims against the individual defendant. It found that the "most immediate, efficient, and direct cause of plaintiff's injuries was the second motorist's abrupt movement and stopping of his vehicle." **253 Mich App at 563**.

In ***Kruger v White Lake Twp,* 250 Mich App 622; 648 NW2d 660 (2002)**, plaintiff called township police requesting that her daughter be taken into custody, claiming that she was intoxicated and posed a danger. The police arrested her and transported her to the police department where she was restrained by being handcuffed to a ballet bar in the booking room, because the lone holding cell was occupied by an intoxicated man. **250 Mich App at 624**. Left by herself, she eventually escaped from the handcuffs and left the police station. Shortly thereafter, she ran into traffic and was hit by an unidentified vehicle.

The Court of Appeals affirmed summary disposition for the defendant officers. Even assuming, without deciding, that the officers were grossly negligent, there were several other more direct causes of the decedent's injuries than the officers' conduct. "It is not enough that the gross negligence be 'a' proximate cause, it must be the 'direct cause preceding the injury.'" **250 Mich App at 627**. The decedent's escape from the police station, running onto the highway into traffic, and the unidentified driver hitting her, were all more direct causes of her injuries than the officers' conduct. Any gross negligence by the officers was too remote to be "the" proximate cause of injury. ***Id.***

In ***Sims v Fitzgerald,* unpublished opinion per curiam of the Court of Appeals, decided July 23, 2002 (Docket No. 232056) (Ex B)**, plaintiff was injured when a vehicle fleeing from police officers ran a red light and collided with another vehicle. The force of

the impact propelled his car onto the sidewalk where it struck plaintiff. The Court of Appeals affirmed immunity for the police officers, explaining that the phrase "the proximate cause" is not synonymous with "a proximate cause." The officers' pursuit of the car which struck plaintiff was not the proximate cause of plaintiff's injuries, which resulted most immediately and directly from the driver's loss of control of his car. Plaintiff's argument that "but for" the pursuit of the fleeing vehicle she would not have been injured, was insufficient to impose liability. Proximate cause encompasses both causation in fact, or but for causation, and legal or proximate cause. "The two types of causation are not identical and causation in fact must be established 'in order for legal cause' or 'proximate cause' to become a relevant issue." (**Quoting *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994)**). While acknowledging that the officer's conduct may have been "a cause in fact" of plaintiff's injuries, it was clear that his conduct was not "the one most immediate, efficient, and direct cause of those injuries."

The Court in ***Hutchinson v Twp of Portage,* unpublished opinion per curiam of the Court of Appeals decided August 14, 2003 (Docket No. 240136) (Ex C)**, likewise rejected plaintiff's claim that immunity could be imposed on individual governmental employees based on "but for" causation. It found that "but for" causation was "plainly not enough to meet 'the proximate cause' test of Robinson." (**Exhibit C, Opinion, p. 3**). ***Hutchinson*** involved the drowning deaths of plaintiff's wife and daughters. Plaintiff sued an employee of the Michigan Department of Natural Resources, who acted as supervisor of a lake dredging project. The dredging was authorized in an area 20' x 75' x 4-1/2' deep around a boat launch, but the actual area dredged was 77' x 400' x 8' deep. Even if the

over-dredging or lack of warning signs could be considered gross negligence, the Court of Appeals held that the individual employee would still be entitled to immunity because the depth of the dredging was not "the proximate cause" of the drowning. Although "the direct role the the depth of the dredging played in the drownings might well suffice to make the 'over dredging' or the lack of warning signs *a* proximate cause of the drownings, ordinary proximate causation is not sufficient under Robinson." (**Exhibit C, p. 3**). In the Court's view it was readily apparent that a more immediate cause of the drowning deaths was that the decedents had little or no swimming ability and were allowed to swim without competent supervision.

In ***Ortiz v Porter,* unpublished opinion per curiam of the Court of Appeals, decided November 30, 2000 (Docket No. 226466) (Ex D)**, the Court of Appeals rejected plaintiff's contention that the failure of the city's fire inspector to insure placement of a smoke detector in plaintiff's home, after allegedly promising to do so, could be "the proximate cause" of the fire which caused the deaths of plaintiff's children. "Whatever the cause of the fire, the fire itself plainly constituted the one most immediate and direct cause of plaintiff's injuries, and defendant undisputably had no involvement with the fire's commencement." (**Exhibit D, Opinion, p. 2**).

Finally, in ***Costa v Comm Emergency Med Serv, Inc,* __ Mich App __; __ NW2d __ (Docket No. 247983 issued September 21, 2004) (Ex E),** the Court of Appeals had no difficulty in distinguishing "the one most immediate, efficient, and direct cause of the injury or damage," citing ***Robinson, supra,* at 462.**

Costa and a co-worker came to Detroit for a business meeting on August 2, 1999.

An altercation later ensued, which resulted in the co-worker striking Costa, causing him to hit his head on the pavement. (**Slip op., p. 3**). Within five (5) minutes of a call to the Taylor Police Department, defendant employees of the City of Taylor Fire Department Emergency Medical Services arrived at the scene. Costa had been moved to the front seat of a vehicle and did not initially respond to stimuli. After regaining consciousness, he was able to recall his name and location, but not the altercation, and had difficulty walking unassisted. ***Id.*** Even so, he refused medical treatment, but by the next morning, required emergency surgery.

Costa sued, among others, the defendant employees of the fire department, claiming gross negligence that was the proximate cause of his injuries. In reversing the trial court's denial of summary disposition on the basis of immunity, the Court of Appeals analyzed plaintiff's allegations. It found only allegations of ordinary negligence. Further, it concluded that reasonable jurors could not find defendant's actions were the proximate cause of Costa's injuries, because the evidence was undisputed that his co-worker had hit plaintiff and knocked him down before the defendants arrived on the scene. (**Slip op., p. 4**).

That reasoning is equally applicable to the facts of this case. Whatever the cause, the fire itself was the one most immediate and direct cause of injury to Plaintiff's decedents. The fire had started before Mr. Childs arrived on the scene. Mr. Childs indisputably had no involvement with the fire's commencement. Based on these facts, Defendant was entitled to governmental immunity. "Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no

further interpretation is necessary." ***Storey v Meijer, Inc,* 431 Mich 368, 376; 429 NW2d 169 (1988)**. There is no support in MCL 691.1407(2) or in this Court's opinion in ***Robinson*** for the result reached by the Court of Appeals majority in ***Dean v Childs***. It should be reversed.

ARGUMENT II

THE SAME POLICY CONSIDERATIONS WHICH CONVINCED THE COURT IN *BEAUDRIE* TO RETAIN THE PUBLIC DUTY DOCTRINE IN CASES INVOLVING POLICE OFFICERS JUSTIFY EXPANDING THE PROTECTION OF THE DOCTRINE TO ENCOMPASS OTHER PUBLIC SAFETY EMPLOYEES, SPECIFICALLY FIRE FIGHTERS

Prior to this Court's decision in ***White v Beasley,* 453 Mich 308; 552 NW2d 1 (1996)**, many decisions of the Court of Appeals had recognized the existence of the public duty doctrine. ***White***, however, was the first decision of this Court holding that the public duty doctrine was viable in Michigan. The Court expressed concern regarding the sometimes inequitable results created by the doctrine, but was ultimately persuaded that, when the doctrine was applied to police officers, the dangerous work environment inherent in police activities justified its adoption. ***White, supra,* at 317.** In addition, the Court noted two basic justifications for retaining the doctrine. First, it protected governments from "unreasonable interference with policy decisions." Second, it protected "government employees from unreasonable liability." ***Id.*** With respect to policy decisions, the Court was concerned that an increased exposure to liability would dissuade municipalities from enacting ordinances designed for the protection and welfare of the general public. Moreover, a "governmental employee's job title alone does not create a duty between the employee and specific members of the public." ***Id,* at 318.** The Court also recognized the

special relationship exception to the public duty doctrine, acknowledging that while the special relationship test was somewhat "arbitrarily restrictive," nonetheless the test provided some relief in "particularly egregious" cases where protection was promised, but negligently carried out. The Court stressed the "unusual and extraordinary nature" of police work, which made it reluctant to expose police officers to on-the-job liability. "Police officers must work in unusual circumstances. They deserve unusual protection." ***White,* 453 Mich at 321**.

The opinion concluded that the public duty doctrine was a doctrine of tort law. **453 Mich at 323**. It determined whether a duty in tort existed, rather than whether an individual was immune from an otherwise existing duty. Duty is an essential element of a claim of negligence. ***Moning v Alfono,* 400 Mich 425, 437; 254 NW2d 759 (1977)**. A determination of the existence of duty inevitably requires a consideration of the status of the parties and their relationship to each other and to society at large. Recognition of a duty is a recognition that plaintiff's interests are entitled to protection from defendant's conduct. Considering the uncertain and dangerous conditions in which police officers worked, the Court felt justified in its conclusion that they deserved unusual protection and that, thus, there was no actionable duty to individuals, absent a special relationship.

The inquiry as to whether a defendant is immune from liability is separate and distinct from the question of whether defendant owed a duty in tort to an individual plaintiff. In the present case, Defendant sought dismissal of Plaintiff's state law claims based on the public duty doctrine, arguing that Defendant Childs did not owe a duty to Plaintiff's decedents in fighting the fire, but rather, his duty was to the public in general. (**See *Jones***

***v Wilcox,* 190 Mich App 564; 476 NW2d 473 (1991); lv app denied 439 Mich 989 (1992)).**

As an initial matter, Plaintiff's claim cannot withstand scrutiny. Plaintiff attempts to characterize Defendant's alleged breach of duty as misfeasance rather than nonfeasance, contending that the public duty doctrine applies only to instances of nonfeasance. Plaintiff's allegations may be equally characterized as nonfeasance, however. They arise out of a "connected chain of events" and can be characterized as either a negligent act or a negligent failure to act. **See *Smith v Jones,* 246 Mich App 270, 278, n 1; 632 NW2d 509 (2001).**

Defendant Childs' alleged affirmative act in driving to a fire hydrant one block away from the fire scene (**Plaintiff's Third Amended Complaint, ¶6**) is equally characterized as a failure to use a closer hydrant. Defendant Childs' alleged affirmative act in "forcing the fire toward" Plaintiff's decedents (**Plaintiff's Amended Complaint, ¶7**) by directing water toward the front of the house may be equally characterized as an allegation that he failed to direct water to the rear of the house, which Plaintiff claims would have aided in rescue attempts. In any event, Justice Cooley's definition of the public duty doctrine included not only "a failure to perform [the duty]," but also "an inadequate or erroneous performance." ***Smith, supra,* at 278, quoting *White, supra,* at 316.**

If the protections of the public duty doctrine encompassed fire fighters, then Defendant Childs should have been entitled to summary disposition of Plaintiff's state claim because Plaintiff could not show a special relationship between the decedents and Defendant Childs. To establish a special relationship, Plaintiff must prove:

(1) An assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured;

(2) Knowledge on the part of the municipality's agent that inaction could lead to harm;

(3) Some form of direct contact between the municipality's agents and the injured party; and

(4) That party's justifiable reliance on the municipality's affirmative undertaking. . . . ***White, supra,* at 320.**

Even if one accepts Plaintiff's argument that Defendant Childs assumed a duty to act by attempting to extinguish the fire, there was no direct contact between township officials and the decedents. Rather, Plaintiff claims only that there was direct contact between township agents and the Plaintiff, who was the mother of the decedents. (**Plaintiff/Appellee's Response to Defendant/Appellant's Application for Leave to Appeal, p. 12**). Furthermore, it was not Plaintiff who would be entitled to rely on the alleged promises made by township officials, but only the decedents. Since Plaintiff could not show a special relationship between the decedents and Defendant Childs, no exception to the doctrine applied, and he was entitled to dismissal.

Both the trial court and the Court of Appeals rejected Defendant's argument regarding the public duty doctrine on the basis of this Court's decision in ***Beaudrie, supra***. ***Beaudrie*** reviewed the scope of the ***White*** decision, noting the differing opinions of various justices. Justice Boyle agreed that police officers should enjoy the protection of the doctrine in cases of nonfeasance; Justice Cavanagh stated that it should protect police officers from liability where they allegedly failed to protect someone from a third party. Significantly, Justice Cavanagh also believed that the protection of the doctrine should be

available to other government safety professionals, such as fire fighters. ***White, supra,* at 331, n 1.**

As ***Beaudrie*** acknowledged, the Court of Appeals has applied the doctrine broadly, in cases as disparate as ski lift inspectors (***McGoldrick v Holiday Amusements, Inc,* 242 Mich App 286; 618 NW2d 98 (2000)**) to medical examiners (***Reno v Chung,* 220 Mich App 102; 559 NW2d 308 (1996), aff'd on other grounds 461 Mich 109; 597 NW2d 817 (1999)**). ***Beaudrie*** considered the doctrine difficult to define and apply. Moreover, expansion was deemed unnecessary because of the significant protections afforded by governmental immunity. A combination of the immunity provided by statute, and traditional tort principles, was deemed a better method of achieving the purpose of the public duty doctrine in protecting governments from interference with policy decisions. ***Beaudrie, supra*, at 134, quoting *Leake v Cain*, 720 P2d 152, 158 (Colo, 1986)**.

Nonetheless, the Court continued to support application of the public duty doctrine (and the special relationship exception) in cases involving an alleged failure to provide police protection because "police officers must work in unusual circumstances. They deserve unusual protection." ***Beaudrie, supra,* at 141, quoting *White, supra,* at 321**. The Court also agreed that the public duty doctrine as applied in ***White*** was consistent with the general common law rule that no one has a duty to protect another endangered by a third person's conduct absent a "special relationship." ***Id.***

It is significant that this Court chose to retain the doctrine for police officers based on their unique responsibilities and the difficult and dangerous situations in which they are required to work. Difficult and dangerous conditions are not limited to police alone, but are

also part and parcel of the work of other public safety professionals, including fire fighters. There is no question that fire fighters also "work in unusual circumstances" and should thus be entitled to "unusual protection." Indeed, fire fighting is one of the most dangerous occupations. The same policy considerations which factored in the decision to retain the public duty doctrine for police officers should apply with equal force to fire fighters. The services provided by fire fighters are protective in nature and intended to benefit the public at large, not any specifically identifiable group. Many departments have eliminated separate police and fire departments and now have public safety officers who function in both capacities. The decision whether the public duty doctrine applies should not be dependent upon which "hat" an officer is wearing in responding to an emergency.

Moreover, abrogation of the doctrine focuses scrutiny on every action taken or not taken in what are most often emergency situations, and subjects these decisions to judicial review each time a party claims that public duties have been improperly executed or that there was a failure to protect someone from harm. And although broad immunity is available, it is obviously insufficient under some circumstances, as it was here. The ***Beaudrie*** Court's decision to continue the protection of the public duty doctrine for police officers indicates that such additional protection is both warranted and necessary in the opinion of this Court.

Having reached that conclusion, it seems clear that other public safety personnel, who engage day in and day out in difficult and dangerous work to protect the public, should be afforded equally broad protection. The special relationship exception provides accountability when a fire fighter's inadequate performance of duty allegedly causes injury in circumstances where there is justifiable reliance on his efforts. The same factors which

support the continued viability of the public duty doctrine for police officers require that fire fighters and other public safety employees likewise receive the benefit of this doctrine.

RELIEF REQUESTED

Amici Curiae Michigan Municipal League and Michigan Townships Association therefore join Defendant/Appellant, Jeffrey Childs' request for leave to appeal, seeking to reverse the Michigan Court of Appeals' decision and the ruling of the Oakland County Circuit Court which denied him summary disposition. *Amici Curiae* further urge this Court to reconsider its decision in ***Beaudrie v Henderson, supra,*** and to expand the protection of the public duty doctrine to all public safety workers.

Respectfully submitted,

O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

By _____

JULIE McCANN O'CONNOR (P38484)
JAMES I. DeGRAZIA (P22853)
Attorneys for *Amici Curiae,* MML and MTA
4111 Andover Road - Suite 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

Dated: September 28, 2004